United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original

B P/S

74-1732

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Docket No.
74-17 32

AL MARTIN,

Defendant-Appellant.

Appeal from The United States District Court for the Southern District of New York

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BRIEF FOR DEFENDANT-APPELLANT

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2. *Whether the Trial Court erred in failing to sustain Defense Counsel's objection to testimony by CHARLES JOHNSON and Police Officer ROBERT O'RILEY that on 25 August 1972 the appellant attempted to murder O'RILEY and his Brother Officer TOMASULO, charges not included in the indictment?*

3. *Whether the Trial Court erred in admitting into evidence Prosecution Exhibits 8 and 9, to wit: a shotgun and revolver, although there was no proof adduced regarding the chain of custody of said weapons nor any testimony elicited from Police Officer O'RILEY connecting the weapons to robbery?*

4. *Whether the Trial Court erred in his refusal to accept the Jury's Conclusion that they were unable to agree and his subsequent prejudicial comments and pressuring of the Jury?*

5. *Whether the sentence imposed by the Trial Court of Fifteen (15) years imprisonment in view of the Appellant's background and lack of any prior conflict with the law was harsh and excessive?*

STATEMENT OF THE CASE

This criminal case comes here on appeal from the United States District Court for the Southern District of New York, the Honorable Milton Pollack, District Court Judge, presiding.

The appellant is ALBERT ENRIQUE MARTIN who stands convicted of Violation of Title 18, United States Code, Sections 2113 (a) and (2). The appellant was indicted on or about February, 1973 by a Grand Jury for the Southern District of New York in a single count indictment charging:

FIRST COUNT:

> *On or about the 16th day of August, 1972, in the Southern District of New York, AL MARTIN and JOHN DOE, the defendants, and others to the Grand Jury known and unknown, by force and violence and by intimidation, did take and attempt to take from the person and presence of another, money and property in the amount of approximately $4,553.05 belonging to and in the care, custody, control, management and possession of the Chase Manhattan Bank, 2065 Second Avenue, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.*
>
> *(Title 18, United States Code, Sections 2113(a) and 2.)*

The appellant was arrested and arraigned before U. S. Magistrate Henry Van Acker on 20 November 1973 and bail was set in the amount of Fifty Thousand ($50,000.00) Dollars. The appellant entered a plea of Not Guilty and on 26 February 1974 went to trial on this indictment before a jury, the Honorable Milton Pollack presiding,

in the United States District Court for the Southern District.

That at the conclusion of the Government's and the appellant's case the appellant moved the Trial Court for an Order dismissing the Government's case on the grounds that the evidence and proof adduced were insufficient to submit to the jury and said motion was denied. (Tr. 295) On 1 March 1974, the jury returned a verdict of Guilty as charged. (Tr. 391) The appellant on 7 March 1974 filed a Motion for Judgment of Acquittal Notwithstanding the Verdict, or in the Alternative for a New Trial (A.[1] 10-12) and on March 1974 said motion was denied by the Honorable Milton Pollack. (A. 9)

On 28 March 1974, appellant appeared before the Honorable Milton Pollack and was sentenced to the Federal House of Detention for Men for a term of imprisonment of fifteen (15) years. (A. 9) On 4 April 1974 appellant appealed his judgment of conviction to the United States Court of Appeals for the Second Circuit. (A. 13)

On 28 March 1974 appellant filed a motion for an Order admitting him to bail pending the determination of his appeal; and bail was set by the Honorable Justice Pollack in the amount of Fifty Thousand ($50,000.00) Dollars. (A. 9)

On 13 May 1974 counsel for the appellant filed a motion before this Court for an Order assigning counsel for the appellant; granting leave to appeal in forma pauperis; and extending appellant's

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1/ The designation (A.) refers to the Appendix attached hereto.

time to perfect the appeal.[2]

On 29 April 1974 this Court issued an Order submitting the proceedings in this appeal[3] and on 23 May 1974 this Court amended the aforementioned Order and extended the appellant's time to file his brief and appendix to 26 June 1974. On 24 June 1974 the appellant filed a Motion with this Court for an Order extending the time to file a brief and appendix to 26 August 1974[4] and on 3 July 1974 this Court issued an Amended Order extending the appellant's time to file his brief and appendix to 10 July 1974.

STATEMENT OF FACTS

I. THE TESTIMONY OF ALPHONSE PECORORA, JR. THAT HIS CAR HAD BEEN STOLEN AND THAT HE HAD BEEN ROBBED AT GUNPOINT BY PERSONS IMPLIEDLY CONNECTED WITH THE APPELLANT, CHARGES NOT INCLUDED IN THE INDICTMENT

A. The testimony of Pecorora.

The U.S. Attorney asked the following questions and Pecorora gave the following answers regarding the alleged robbery:

By Mr. Mukasey:

Q: Mr. Pecorora, I believe you testified that on August 3, 1972, you were in possession of your car and that it was taken from your possession, is that right?

2/ See Appellant's motion dated 26 April 1974.
3/ See Court's Order dated 29 April 1974.
4/ See Court's Order dated 3 July 1974.

A: At gunpoint. (Tr. 102)

* * *

The Court: Did you consent that it be taken from you?

The Witness: No.

The Court: Was anything taken from your person at the time?

The Witness: My wallet and credit cards and driver's license.

Q: Do you recall which credit cards you had with you at the time?

The Witness: I had the TWA and the United Airlines. As far as I could remember there was Saks and Gulf which I had just got a new credit card of it and Exon and Playboy Club.

Q: Mr. Pecorora, I show you a credit card marked Government's Exhibit 6 for identification, a Saks Fifth Avenue credit card and ask you whether you can identify that.

A: This is my name on it.

The Court: Is that the card that was taken from you?

The Witness: Yes. (Tr. 104)

B. <u>The Trial Court's admission into evidence Pecorora's Testimony over the objections of defense counsel.</u>

Prior to the above-mentioned testimony of Pecorora the following exchange took place between the Court, Mr. Wells, and Mr. Mukasey: (at the side bar.) Tr. 96

Mr. Mukasey: My offer of proof is as follows: He will testify on that day two people stole his car and his wallet. His wallet at that time contained several credit cards of which one will be identified in Court

by him which was later found in the defendant's apartment. (Tr. 97)

* * *

Mr. Wells: Judge, my objection to this testimony is based upon the following reasons: Number one, this witness is called up to testify as to other acts that are criminal in nature, perhaps not committed by this defendant, not even suggested by the government that they were committed by this defendant or in any act connected with this defendant.

The Court: He is saying its connected with this defendant because he has just told you that the wallet was found in this defendant's apartment and the getaway car was the car that was used in the robbery in which this defendant participated.

Mr. Wells: That is his conclusion which of course raises the highly prejudicial question of another crime being permitted.

The Court: That is not the purpose of the evidence. There is no purpose to talk about any other crime. The fact is the car was taken from his possession forcibly and there was taken from his possession forcibly a wallet with certain credit cards and that is where the matter ends. (Tr. 98)

C. *Defense counsel's request for a limiting instruction to the jury regarding the probative value of this highly inflammatory and prejudicial testimony of Pecorora.*

Mr. Wells: I will object to it and if you deny, I will except to it. The second phase of it is, since you are going to permit this testimony, I am asking the Court whether the Court will give that limited instruction to the jury as to the probative value of this testimony.

The Court: I would like to know from you-- I am going to allow him to prove that his car left his possession without authorization; that his credit card left his possession without authorization, then

I assume he will identify the credit card. (Tr. 99) He has already identified the car. If you want me to, I will say something about there being no claim that either of those events involved the defendant so far as this witness is concerned.

Mr. Wells: Thank you.

The Court: Is that what you want.

Mr. Wells: Yes, please.

Judge, that is what I want in light of the fact you are going to permit it. I object to it.

The Court: What is your ground for objecting to it?

Mr. Wells: It's highly inflam(m)atory.

The Court: How can it be inflam(m)atory if this man wound up driving this automobile and being in possession of the credit card?

Mr. Wells: If he wound up barring this automobile, it doesn't mean he was at all involved with the taking of the automobile. (Tr. 100)

Notwithstanding defense counsel's objection the Court permitted the inflammatory and prejudicial testimony of Mr. Pecorora regarding the alleged robbery. The Court gave the following instruction regarding Pecocora's testimony:

The Court: The government does not contend, ladies and gentlemen, and I want to make it clear to you at this point, that the loss of the gentlemen's car and his credit cards was any of the doing of this defendant at that time so far as this witness is concerned. There is no inference of that kind to be drawn from you. The only proof that is before you is that the gentlemen's car was taken without his permission, his wallet was taken without his permission and his credit cards were taken without his permission. (Tr. 105)

This limiting instruction by the Court below did not preclude the jury from drawing negative inferences regarding the appellant's association with the participants in the robbery as a conspirator even though the jury was instructed that the appellant was not an actual participant. Accordingly the jury could have inferred that the appellant was a co-conspirator in the robbery of Pecorora; or at the very least that he was an associate of the individuals who stole the car, both of which attack appellant's character.

II. THE TESTIMONY OF CHARLES JOHNSON THAT THE APPELLANT WAS INVOLVED IN AN ATTEMPTED MURDER OF POLICE OFFICERS, A CHARGE NOT INCLUDED IN THE INDICTMENT

A. The testimony of Johnson.

The U. S. Attorney asked the following questions and Mr. Johnson gave the following answers regarding an attempted murder of two New York City police officers that allegedly occurred on 25 August 1972, nine days after the alleged robbery:

> *Q. Mr. Johnson, directing your attention to August 25, 1973, about nine days after the robbery, about 1:00 a. m., where were you?*
>
> *Mr. Wells: Objection.*
>
> *The Court: Overruled.*
>
> *A. I was in New York.*
>
> *Q. Do you recall where?*
>
> *A. Are you referring to the particular incident that happened that night?*

Q. Yes.

A. I was involved in a shoot-out that night.

Q. With whom?

A. With two police officers.

Q. Where did that take place?

A. On a highway. I believe it was West Side Drive. The only thing I remember the river was there.

Q. The river was on your left?

A. Yes.

Q. Were you in a car?

A. Yes, I was.

Q. Was anyone else in the car with you?

A. Yes, there was. (Tr. 164)

Q. Who?

A. The defendant and my co-defendant, Mr. Witherspoon.

The Court: When you say the co-defendant--

The Witness: I am referring to both parties, John Witherspoon and Mr. Martin.

The Court: They were with you in that car?

The Witness: Yes, they was.

Q. Anyone else?

A. And myself. That is all.

Q. Who was driving?

A. Mr. Martin was driving. (Tr. 165)

The appellant was not charged in the indictment with attempted murder of police officers, however, this testimony was admitted and the admission of this evidence at the trial below predisposed the jury into believing that the appellant was guilty of the crimes charged in the indictment.

III. THE TESTIMONY OF NEW YORK CITY POLICE OFFICER ROBERT O'RILEY THAT THE APPELLANT ON 25 AUGUST 1972 ATTEMPTED TO MURDER HIM AND HIS BROTHER OFFICER TOMASULO, A CHARGE NOT INCLUDED IN THE INDICTMENT

A. The testimony of O'Riley.

Police Officer O'Riley testified in part as follows regarding the alleged attempted murder:

Q. Did the driver do or say anything?

A. Nodded his head.

Q. Do you see in the courtroom the man who was driving that car?

A. Yes.

* * *

Mr. Mukasey: May the record reflect the correct identification of the defendant?

The Court: Yes. (Tr. 227)

* * *

Q. Then what happened?

A. As soon as I pulled the radio car alongside, shots erupted from the vehicle.

Q. The vehicle being the vehicle you were alongside?

A. Right. (Tr. 228)

* * *

The Witness: ...As I pulled the radio car up the one lone male cut across First Avenue and started running southbound and the two that were fiddling with something at the back of the car ran southbound on the east side of First Avenue. I immediately stopped the radio car and I chased the one male that ran on the West side of the street and apprehended him on 38th Street between First and Second.

* * *

Q. I show you a photograph marked Government's Exhibit 14 for identification and ask you whether you can identify that.

A. Yes. That's the fellow I caught.

Q. Do you know his name?

A. John Witherspoon.

Mr. Mukasey: The government offers in evidence Government's Exhibit 14.

Mr. Wells: Objection, your Honor.

The Court: Overruled. (Tr. 229)

* * *

A. From there we immediately went back to the suspect vehicle and on the sidewalk next to the rear door of this vehicle we found a large, brown, leather suitcase which was opened and inside the suitcase were three sawed-off shotguns and a 38-caliber revolver and extra ammunition for everything. (Tr. 230)

B. <u>The Trial Court's admission into evidence of a shotgun and a revolver although there was no proof adduced regarding the chain of command or any evidence elicited from the police officer connecting these weapons to the alleged robbery.</u>

Q. Patrolman O'Riley, I show you a shotgun, Government's Exhibit 8 for identification, and ask you whether that was one of the shotguns found near that car.

A. Yes.

Q. I show you a revolver marked Government's Exhibit 9 for identification and ask you whether that was found near that car.

A. Yes.

Mr. Mukasey: Your Honor, the government offers in evidence Government's Exhibits 8 and 9.

Mr. Wells: Objection, your Honor.

The Court: On what ground?

Mr. Wells: On the grounds that there is no connection with this defendant, Mr. Martin, with these weapons. (Tr. 230) In the first instance the officer says that he lost sight of the vehicle for awhile when he went and arrested another person, and returning on the sidewalk near it there was a bag. It was opened and these were found in the bag. There is nothing in his testimony that can show continuous observation of the bag and there is nothing to indicate that he can testify that these items were in fact in a bag or that bag in the car at the time Mr. Martin is alleged to have been in that car.

Mr. Mukasey: That is for the jury, your Honor.

The Court: Objection overruled.

Mr. Wells: Except, your honor.

The Court: Exhibits are received.

Mr. Wells: I further object on the grounds that these items have been indicated or identified by other witnesses as having been the property of other persons. There is no charge of acting in concert or conspiracy, at no time is Mr. Martin alleged to have either one or any of these in his possession.

The Court: The ruling stands. (Tr. 231)

The clear purpose of this evidence was to inflame the prejudices of the jury against the appellant and to deny him a fair trial. The U.S. Attorney further commented on this evidence of another crime in his summation:

* * *

> *It's a funny thing that during that whole time they (JOHNSON and MARTIN) knew each other, the whole time they were planning the robbery, executing the robbery, riding in that car, trying to blow two policemen away... (Tr. 345)*

The clear import of Johnson's testimony, O'Riley's testimony and the improper comment of the U.S. Attorney was to inflame the prejudices of the jury and to deny the appellant a fair trial uninfluenced by evidence of other alleged crimes not charged in the indictment. O'Riley's testimony was especially significant and during their deliberations the jury requested that O'Riley's testimony be reread. (Tr. 390-91)

IV. THE TRIAL JUDGE'S REFUSAL TO ACCEPT THE JURY'S FIRST VERDICT AND HIS PREJUDICIAL AND IMPROPER COMMENT THAT THE CASE WOULD HAVE TO BE RETRIED BEFORE ANOTHER JURY

The Jury received appellant's case on 28 February 1974 and at 6:35 P.M. on that date the Court received a note that the jury could not reach a verdict. (Tr. 386) The Court gave the jury the following instruction:

> *The Court: Ladies and gentlemen, I have her a note that says, "After careful deliberation, we feel it's not possible to reach a verdict everyone can agree to."*

The Court is not prepared to accept that report at this time and considers that it will be more appropriate that more time be devoted to the discussion of the evidence and the inferences from the evidence and if necessary, to give you a further rereading of any testimony about which you may be in doubt.

In view of the fact we have a number of ladies on the jury, it has been my custom not to hold such a jury downtown late at night for reasons that may appear to you. Accordingly, I am going to now excuse you to return here tomorrow morning at 9:30 to continue your deliberations and thus avoid a late night session.

I want to direct you and caution you not to discuss this case any further among yourselves between now and tomorrow morning, not to let anybody discuss it with you. (Tr. 386) In fact, not even bother to think about it until you come back refreshed and with a clear mind to consider again what the facts are as they have been presented to you and in that way, we'll be best able to determine whether this case should be completed with this jury or whether it has to be retried before another jury. A retrial involves the same problems, trouble and expense of redoing anything. (Tr. 387)

* * *

Mr. Wells: I would like to state my objection to the Court's statement to the jury about one, a retrial and number two, about the expense of the trial of the case. I think that was prejudicial, and I think that that can influence a jury and their determination should be free from any consideration as to expense, time or other involvement that people may involve themselves in prosecuting the case or in fact would in fact go to trial a second time. (Tr. 387-88)

This instruction by the Court was highly improper and unduly pressured the jury into inferring that they had to reach a

unanimous verdict; since the Court had stated that if no unanimous decision was reached the case would have to be retried.

V. THE COURT SENTENCED THE APPELLANT TO A TERM OF IMPRISONMENT OF FIFTEEN YEARS NOTWITHSTANDING THE FACT THAT THE APPELLANT HAD NO PREVIOUS CRIMINAL HISTORY

A. The appellant had no prior conflicts with the law.

Counsel for the appellant at the Sentence Hearing, inter alia pointed out to the Court that the appellant had never been convicted of a crime. (AR 7) [5/] *Notwithstanding this lack of criminal history the Trial Judge sentenced the appellant to fifteen (15) years and stated in part:*

> *The Court:*
>
> * * *
>
> *In talking to the probation officer and again in your remarks this morning, you seem to underscore the things that you said to him, where he reports that you defined American society as decadent, racist, capitilistic, militaris(tic) (AR 9)*

This statement by the Court indicates that the sentence imposed was based upon the appellant's political beliefs and not necessarily for the crime of which he was convicted. Moreover, the sentence did not take into account the appellant's background and his lack of prior conflict with the law.

5/ *The designation (AR) refers to the Sentence Hearing of 28 March, 1974.*

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO SUSTAIN DEFENSE COUNSEL'S OBJECTION TO TESTIMONY BY PECORORA THAT HIS CAR HAD BEEN STOLEN AND THAT HE HAD BEEN ROBBED BY PERSONS CONNECTED WITH THE APPELLANT IN THE BANK ROBBERY, CHARGES NOT INCLUDED IN THE INDICTMENT, VIOLATED THE APPELLANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

A. The appellant was not charged with Grand Larceny or any crime of Robbery or Assault on Pecorora and the sole purpose of this testimony was to inflame the prejudices of the jury against the appellant and deny him his right to a fair trial by an impartial jury.

The stated purpose of Pecorora's testimony was to allegedly connect a credit card taken from Pecorora to the appellant (Tr. 97) and to identify the "getaway car" used in the robbery as the same car stolen from Pecorora. (Tr. 98) The Court's limiting instruction (Tr. 105) could not cure this error.

B. The Prosecution cannot prove against a defendant any crime not charged in the indictment.

The Laws governing the admissibility of evidence of crimes or bad acts other than those specifically alleged in the indictment under which the defendant is being tried is clear and unequivocal. The issue of a defendant's character does not come into play in a criminal prosecution unless the defendant offers evidence to show his good character.

1 Wigmore on Evidence, paragraphs 57 and 58, p. 456-57 (3rd ed.) As will be discussed below in Point II. infra, the prosecution is also precluded from introducing during its case-in-chief evidence of crimes or bad acts totally separate and apart from those for which the defendant is being tried, unless the introduction of such evidence is substantially relevant for some purpose other than to show a probability that the defendant committed the crime or that the defendant is a person of criminal character or disposition. Michelson v. U.S., 335 U.S. 469 (1948) and Boyd v. U.S., 142 U.S. 350 (1892).

C. The indictment does not charge the appellant with Robbery and Grand Larceny or Assaulting Pecorora.

The indictment charges that on or about 16 August 1972 appellant and others violated Title 18 U.S. C.A. paragraphs 2113(a) and (2) to wit: Robbery of a bank in the City of New York that was insured by the Federal Deposit Insurance Corporation. (A.3) This indictment does not charge the appellant with having stolen the car or robbing and assaulting Pecorora, however, the Trial Judge over the objection of defense counsel, admitted the testimony of Pecorora that he had been robbed of his wallet and credit cards and that his car was stolen on 3 August 1972, thirteen days before the 16 August 1972 bank robbery. Moreover, prosecution witness CHARLES JOHNSON, who testified that the appellant, WITHERSPOON, and himself committed the bank robbery (Tr. 158) also testified that he had stolen the car from Pecorora. (Tr. 162) The Trial Judge attempted to cure this error by instructing

the jury that the prosecution was not claiming that the appellant had been involved in this separate crime (Tr. 163), however, the prosecutor presented JOHNSON as a "partner in crime" of appellant and it was the contention of the prosecutor that the stolen car was used as the "get-away car" in the bank robbery. (Tr. 98) Thus, it is clear even though the prosecution did not claim that the appellant had stolen the car, the relationship that the prosecution sought to establish between JOHNSON and the appellant, could easily lead the jury to infer that the appellant directed that the car be stolen.

II. THE TRIAL COURT'S FAILURE TO SUSTAIN DEFENSE COUNSEL'S OBJECTION TO TESTIMONY BY CHARLES JOHNSON AND POLICE OFFICER ROBERT O'RILEY THAT ON 25 AUGUST 1972 THE APPELLANT ATTEMPTED TO MURDER O'RILEY AND HIS BROTHER OFFICER TOMASULO, CHARGES NOT INCLUDED IN THE INDICTMENT, VIOLATED THE APPELLANT'S RIGHTS UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A. The appellant was not charged with Attempted Murder nor was he so charged in New York State Court with Attempted Murder and it is clear from the Prosecutor's Summation that the purpose of this testimony was to inflame the prejudices of the jury against the appellant and to deny him his right to a fair trial by an impartial jury.

Prosecution witnesses Johnson and O'Riley both testified that the appellant was involved in an attempted murder of Police Officers O'Riley and Tomasulo nine (9) days after the bank robbery. (Tr. 164-

65; 227-28) Police Officer O'Riley testified that he was beckoned over to the car by the appellant who was driving and as soon as he pulled alongside the car shots erupted. (Tr. 228) It is difficult to imagine evidence that would be more prejudicial to a defendant in a criminal prosecution. The prejudicial nature of this evidence and the purpose of its introduction is obvious in the prosecutor's summation where he asserts that the appellant was"...trying to blow two policemen away..." (Tr. 345) Moreover the appellant was not charged in the indictment with Attempted Murder of Police Officers nor was he charged in New York State Court. (Tr. 238)

B. The prosecution cannot introduce evidence of crimes or bad acts not charged in the indictment under which a defendant is being tried.

The Supreme Court and this Court have consistently held that evidence of crimes or bad acts totally separate and apart from that for which the defendant is being tried must be excluded, unless the introduction of such evidence is substantially relevant for some purpose other than to show a probability that the defendant committed the crime or that the defendant is a person of criminal character or disposition. Michelson v. U.S., U.S. 335 U.S. 469 (1948); Boyd v. U.S., 142 U.S. 350 (1892); Tallo v. U.S., 344 F.2d 467 (1st Cir. 1965); U.S. v. Beno, 324 F. 2d 582 (2nd Cir. 1963); U.S. v. Tomaiolo, 249 F. 2d 683 (2nd Cir. 1963); U.S. v. James, 208, F.2d 124 (2nd Cir. 1953); U.S. v. Modern Reed & Rattan Co., 159 F. 2d 656 (2nd Cir. 1947); McCormick Evidence, section 157 (1954 ed.)

The purposes for which such evidence is permitted has been summarized by the Supreme Court in Spencer v. Texas, 385 U.S. 554, reh den 386 U.S. 969 (1967) as follows:

> *"Because such evidence is generally recognized to have potentiality for prejudice, it is usually excluded except when it is particularly probative in showing such things as intent...; an element in the crime...; identity,...;malice,...; motive,...; a system of criminal activity,...; or when the defendant has raised the issue of his character,...; or when the defendant has testified and the State seeks to impeach his credibility,..."*
> *(385 U.S. 554 at 560-561)*

Furthermore, this prohibition is not limited to crimes of bad acts which occur prior to the offense charge, but relates as well to crimes or bad acts which occur subsequent to the offense charged. U.S. v. Lewis, 482 F. 2d 632 (D.C. Cir. 1973); Spurr v. U.S., 87 F.2d 701 (1898); reversed on other grounds, rev'd, 174 U.S. 278 (1899).

C. The admission into evidence of testimony that appellant had attempted to murder Police Officers O'Riley and Tomasulo does not fall within the exceptions to the general rule announced in Spencer v. Texas, supra.

1. The prosecution was precluded from introducing such evidence to impeach the appellant's credibility or to impugn his character.

The appellant did not testify on his own behalf nor did he proffer any evidence attesting to his good character; accordingly, the prosecutor is precluded from introducing the evidence of the attempted murder under this exception to the general rule.

2. The evidence of the alleged attempted murder was not introduced to establish a system of criminal activity.

There is no logical connection between the alleged attempted murder and the bank robbery charge against the appellant nor did the Prosecution establish at trial any system of criminal activity.

3. The evidence of the alleged attempted murder was not introduced to establish the motive of the appellant.

The charge against the appellant was bank robbery and the prosecutor was not required to prove motive nor could it be asserted that even if the prosecutor had been required to prove motive that there was any common motive involved in the alleged robbery and attempted murder.

4. The evidence of the alleged attempted murder was not introduced to establish intent, malice, or to prove an element of the crime charged, to wit: robbery.

The attempted murder was not introduced to establish intent since the intent of an alleged bank robber may be inferred from the nature of the act itself as contrasted with a case where a defendant is charged with passing counterfeit money. In the latter case intent is of the essence of the crime and proof of previous offenses of a similar character by the same person may be proved to show intent. Moreover, the attempted murder was not an element of the crime charged, nor is malice an element of the crime charged in the indictment.

5. The evidence of the alleged attempted murder was not introduced to establish identity.

The appellant has been identified as a participant in the robbery by prosecution witnesses JOHNSON, (Tr. 149-166); and IGLESIAS, (Tr. 44-49). Police Officer O'Riley was not at the scene of the alleged robbery and there is no logical connection between his identification of the appellant on 25 August 1972 and the bank robbery. It is clear from the prosecutor's summation (Tr. 347; 352-54) that the purpose of this testimony in addition to inflaming the prejudices of the jury and denying appellant a fair trial was to buttress and corroborate the testimony of the alleged accomplice CHARLES JOHNSON. Moreover, the Trial Judge made clear in his charge that the implicating testimony of an alleged accomplice was sufficient to convict the defendant even though it may not be corroborated or supported by any other evidence. (Tr. 374; A. 28)(For a detailed discussion of the above-mentioned exceptions to the general rule see the New York Court of Appeals landmark decision in People v. Molineux, 168 N.Y. 264, at 291-297, 305-316, (1901)[6]

D. *The right to a fair trial by an impartial jury uninfluenced by any prior or subsequent bad acts or crimes is so fundamental to our criminal justice system that failure of a defendant to object to introduction of such evidence does not waive this right.*

In Boyd v. U.S. 142 U.S. 350 (1892), the principal assignments of error related to the admission of evidence as to several robberies committed prior to the day the deceased was shot, and which did not elucidate the issue before the jury, namely whether the defend-

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6/ *Rule 26 of the Federal Rules of Criminal Procedure provides that the common law rules of evidence are applicable to Federal Courts.*

ants murdered the deceased.

In reversing the conviction of the defendants, the Court stated:

> *"But we are constrained to hold that the evidence as to the Brinson, Mode, and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community. . . . However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."*
>
> *(Boyd v. U.S., supra at 458)*

And in Michelson v. U.S., 335 U.S. 469 (1948), the Court undertook an extensive review of the common law as it relates to proof of reputation or character. During the course of this review, Mr. Justice Jackson stated:

> *"Courts that follow the common-law tradition almost unanimously have come*

to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U.S. US 559, 62 L ed 469, 38 S Ct. 209, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show drefedant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weight too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

(335 U.S. at 474-475)

E. This Court has repeatedly held that evidence of other crimes is inadmissible when the impact of such evidence tends to show only that a defendant is a person of criminal character or disposition.

In U.S. v. Beno, 324 F. 2d 582 (2d Cir. 1963); U.S. v. Tomaolo, 249 F. 2d 683 (2d Cir. 1957); U.S. v. James, 208 F. 2d 124 (2d Cir. 1953); U.S. v. Modern Reed & Rattan Co., 159 F. 2d 656 (2d Cir. 1947).

U.S. v. Beno, supra, was the prosecution of an Internal Revenue agent for soliciting and receiving a gratuity with intent to influence an official decision. On appeal defendant contended the pro-

secution was improperly permitted to adduce on his cross-examination highly prejudicial evidence concerning specific acts of defendant which were unrelated to the offense charged. This evidence concerned compensation received in connection with the preparation of tax returns; false signatures on returns; fraudulent submission of travel vouchers to the government; traffic convictions ; a trip to California with a lady friend and an alleged threat to a police officer who arrested defendant for reckless driving.

This Court held that the introduction of such evidence was irrelevant, highly inflammatory and prejudicial. Furthermore, this Court stated:

> *"As we have already indicated, a criminal defendant is entitled to have his guilt or innocence determined on the specific offense charged and not risk the possibility of conviction for a series of prior specific acts which collectively suggested that his career had been reprehensible. The force of this principle, which lies at the heart of our criminal law system and seems a vital part of our definition of due process of law, is no way blunted merely because of a defendant has, in seeking acquittal, introduced evidence of less than questionable relevance. While there are instances in which a defendant may waive rights which the law invokes for his protection, Walder v. United States, supra, the right to be tried for a specific offense, as the very foundation of a criminal trial as we know it, cannot be one of them."*
>
> *(324 F. 2d 582 at 589)*

U.S. v. Tomaolo, 2249 F. 2d 683 (2d Cir. 1957) involved an appeal from a robbery conviction. At trial a co-defendant was asked

by the prosecutor whether he had met defendant Lewis Soviero at his brother's home during certain visits. In response, the co-defendant stated that defendant Soviero "was in prison at the time."

The defendant Soviero moved for a mistrial but the motion was overruled. Thereupon the prosecutor requested the jury to disregard the statement and the judge repeated the statement made by the prosecutor.

In reversing the defendants' conviction, this Court stated:

> *"Soviero's character was not in issue nor was his credibility open to attack. United States v. Modern Reed & Rattan Co. 2 Cir., 1947, 159 F. 2d 656. The fact that he had been in prison was irrelevant and incompetent. This testimony indicating a criminal record could only serve to prejudice the jury. It made a fair and impartial trial impossible. Although the jury was advised to disregard the statement, that could not have erased from their minds its prejudicial effect."*
> *(249 F. 2d at 695)*

Again, in U.S. v. James, 208 F. 2d 124 (2d Cir. 1953), this Court had occasion to hold that evidence admitted at trial of other crimes prejudiced a defendant.

In James, defendant was being tried for the unlawful sale of narcotics. A narcotics agent testified as a witness for the government that he had arrested appellant on June 14, 1952 at 90 Church Street in New York City and that he then had a conversation with appellant. He then testified that the defendant had told him that he had been arrested previously on the night of January 3, 1952.

This Court held as follows:

> *"The appellant did not testify and no evidence to show his unsavory character was admissible, not because of its irrelevance, but because of a dominant policy which recognizes that what tends to show a likelihood that the accused had flouted the law at some other time is too apt to be given undue weight by the jury and to prejudice his right to a fair trial on the instant charge."*
>
> *(208 F. 2d at 124)*

Furthermore, this Court stated:

> *"They were charged with specific violations of the statute and were entitled to be tried only for those offenses and upon nothing but competent evidence. Boyd v. United States, 142 U.S. 450, 12 S. Ct. 292, 35 L.Ed. 1077. The general rule applicable to them is that evidence of the commission of a wholly separate and independent crime even though of the same nature is not admissible... Sound policy in the administration of the criminal law underlies this well established principle and little is to be gained by pointing out that its exclusion can hardly be justified on the ground of irrelevancy. Nor should we fail to notice a plain error so far reaching because no objection was taken."*

And in U.S. v. Modern Reed & Rattan Co., 159 F. 2d 656 (2d Cir. 1947), appellants were convicted on an information charging violation of the Fair Labor Standards Act of 1938. It was alleged in the information that appellants had previously pleaded guilty after an information charging other violations of the Act had been filed and that they had been sentenced for those offenses. These prior convictions were made known to the jury by the prosecutor at the start of the trial without objection by defendants' trial counsel.

This Court held that it was reversible error to put the fact of the previous conviction and sentence of the defendants for previous violations of the statute before the jury and that the Court would notice the error even though no objection was taken.

This Court stated:

> *"They were charged with specific violations of the statute and were entitled to be tried only for those offenses and upon nothing but competent evidence.... The general rule applicable to them is that evidence of the commission of a wholly separate and independent crime even though of the same nature is not admissible. ...Sound policy in the administration of the criminal law underlies this well established principle and little is to be gained by pointing out that its exclusion can hardly be justified on the ground of irrelevancy. Nor should we fail to notice a plain error so far reaching because no objection was taken."*
>
> *(159 F. 2d at 658)*

The cases discussed above clearly indicate that the Trial Judge committed reversible errors in admitting the testimony of Pecorora, Johnson, and O'Riley concerning evidence of crimes not charged in the indictment. Moreover the probative value of this testimony could not outweigh the resulting prejudice to the appellant. As indicated in our discussion supra, this testimony was not necessary to establish motive, intent, malice, an element of the crime charged, a system of criminal activity, or identity. However, it is difficult to imagine evidence that would be more prejudicial than that the appellant had impliedly directed the stealing of a car at gunpoint and had attempted to murder two police officers.

III. *THE TRIAL JUDGE'S FAILURE TO SUSTAIN DEFENSE COUNSEL'S OBJECTION TO THE INTRODUCTION OF A SHOTGUN AND REVOLVER, GOVERNMENT'S EXHIBITS 8 AND 9 ALTHOUGH THERE WAS NO PROOF ADDUCED REGARDING THE CHAIN OF CUSTODY OF SAID WEAPONS OR ANY EVIDENCE ELICITED FROM POLICE OFFICER O'RILEY CONNECTING THE WEAPONS TO THE ALLEGED ROBBERY VIOLATED THE APPELLANT'S RIGHTS UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES*

The Trial Judge admitted into evidence Government's Exhibits 8 and 9, to wit: a shotgun and a revolver, over the objection of defense counsel. (Tr. 230-31) These weapons were admitted notwithstanding the fact that there was no proof adduced that established a continuous chan of custody nor was there any proof adduced that established the Police Officer O'Riley had continuous observation of the alleged bag that contained the weapons. (Tr. 231) Moreover, there was no testimony from O'Riley that the appellant had either of the weapons in his possession. (Tr. 231) Accordingly the Trial Court erred in admitting these weapons into evidence. 7/

IV. *THE TRIAL JUDGE'S REFUSAL TO ACCEPT THE JURY'S CONCLUSION THAT THEY WERE UNABLE TO AGREE AND THE SUBSEQUENT PREJUDICIAL COMMENTS AND PRESSURING OF THE JURY BY THE TRIAL JUDGE VIOLATED THE APPELLANT'S RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION*

The Trial Judge received a note from the jury that they could

7/ *See, 68 A.L.R.2 903 - Section 7 and 11-E.*

not reach a verdict (Tr. 386), however, rather than declaring a mistrial the Judge refused to accept this report and directed that the jury return the next morning to "determine whether this case should be completed with this jury or whether it has to be retried before another jury." (emphasis added; Tr. 387) To compound this error the Court added: "A retrial involves the same problems, trouble and expense of redoing anything." Defense counsel objected to the instructions as highly improper and prejudicial (Tr. 387-88) and the Court stated that what had been given to the jury was the standard information given in an "Allen Charge". (Tr. 388)

The so-called "dynamite charge" or "Allen Charge" named after Allen v. United States, 164 U.S. 492 (1896) is increasingly falling into disrepute with appellate courts. Trial Manual For the Defense of Criminal Cases - II, (2nd ed.), 1971, ANTHONY G. AMSTERDAM, BERNARD L. SEGAL, and MARTIN K. MILLER, at p. 2- 394. In United States v. Martinez, 446 F.2 118 (2nd Cir. 1971), the sole issue raised on appeal was whether the trial judge erred in giving the "Allen Charge" sua sponte. This Court upheld the judgment of conviction and stated in part:

* * *

> *...the district court did not abuse its discretion by giving the "Allen" charge when it did, (after three hours of deliberation) and we so hold. In any event, without an objection by appellant after the charge was given, (footnote omitted) we cannot say that the district*

court committed plain error.

(United States v. Chaplin, 435 F.$_2$ 320 (2d Cir. 1970) (446 F.$_2$ at 120)

In Martinez supra unlike the instant case there was no indication that the jury had failed to agree on a verdict and after the "Allen" charge was given there was no objection by defense counsel. (446 F.$_2$ at 119) Moreover, this Court also recognizes in the Martinez decision that the "Allen" charge has been criticized by judges, commentators, and that some circuits forbid its use entirely:

* * *

> *We recognize that in recent years the traditional "Allen" charge has received criticism from both judges, see, e.g., United States v. Sawyers, 423 F.$_2$ 1335, 1344 (4th Civ. 1970) (dissenting opinion); Thaggard v. United States, 354 F.$_2$ 735, 739 (5th Cir. 1962) (opinion dissenting in part), and commentators, see, e.g., 2 C. Wright, Federal Practice and Procedure (Criminal) Section 502, at 360 (1969); Comment, on Instructing Deadlocked Juries, 78 Yale L.J. 100 (1968); Note, Due Process, Judicial Economy and the Hung Jury: A reexamination of the Allen Charge, 53 Va. L. Rev. 123 (1967), and that some jurisdictions forbid its use entirely see, e.g., United States v. Thomas, 39 L.W. 2306 (D.C. Cir. Nov. 6, 1970); United States v. Fioravanti, 412 F.$_2$ 407, 414-420 (3d Cir), cert. denied sub nom, Pannaccione v. United States, 396 U.S. 837, 90 S. Ct. 97, 24 L.Ed.$_2$ 88 (1969); State v. Thomas, 86 Ariz. 161, 342 P.$_2$ 197 (1959).*
>
> *(446 F.$_2$ at 119-20)*

And in United States v. Domenech 476 F.$_2$ 1229 (2nd Cir.

1973), the defendant appealed from a judgment of conviction following a jury verdict of guilty of possessing with intent to distribute over 100 grams of heroin. One of the issues raised on appeal was whether the trial judge erred in giving the "Allen" charge when the jury reported itself after some hours of deliberation. This Court upheld the "Allen" charge, however, it also implied that en banc reconsideration of the general area should be reconsidered in light of United States *v.* Martinez, *supra,*

* * *

> *This court has consistently and recently upheld normal versions of the "Allen" instruction (see, e.g. United States v. Birrell, 447 F.2 1168, 1173 (2d Cir., 1971), cert. denied, 404 U.S. 1025, 92 S. Ct. 675, 30 L. Ed. 675 (1972); United States v. Bowles, 428 F.2 592, 595 (2d Cir.), cert. denied, 400 U.S. 928, 91 S. Ct. 193, 27 L. Ed.2 188 (1970); United States v. Hynes, 424 F.2 754 (2d Cir.), cert. denied, 399 U.S. 933, 90 S. Ct. 2270, 26 L. Ed.2 804 (1970) and we are of couse bound by those rulings. There is no occasion to consider whether en banc reconsideration should now be had of this general area (see United States v. Martinez, 446 F.2 118, 119-120 (2d Cir.) cert. denied, 404 U.S. 944, 92 S. Ct. 297, 30 L. Ed.2 259 (1971) since appellant did not, at the trial, challenge the "Allen" charge as such, but only a single one of the trial judge's statements. (emphasis added)*
>
> *(476 F.2 at 1231-32)*

This case is an appropriate one for this Court to reconsider the general area of the so-called "dynamite" or "Allen" charge for

several reasons. In addition to the fact that the "Allen" charge has been criticized by judges and commentators and its usage forbidden in several circuits, in the case at bar, defense counsel objected to the "Allen" charge at the trial and it is at best conjecture and speculation that the "Allen" charge below was not unfairly coercive. Accordingly, this Court should decide whether, in light of the facts and circumstances of this case, the trial judge's supplementary charge was unduly coercive and particularly in view of the inflammatory and prejudicial evidence that was erroneously admitted and that the jury requested be reread during their deliberations.

V. THE SENTENCE IMPOSED BY THE TRIAL JUDGE OF FIFTEEN YEARS IMPRISONMENT IN VIEW OF THE APPELLANT'S BACKGROUND AND LACK OF ANY PRIOR CONFLICT WITH THE LAW WAS HARSH AND EXCESSIVE

The appellant is thirty one (31) years of age and graduated from Aviation High School, New York City in 1965, majoring in Jet Mechanics and also attended Bronx and Manhattan Community Colleges in 1962, 1965; 1969-70. He was employed as a Supervisor of Executive Credit for American Express Company from 1966-69; worked as a Senior Census Interviewer: New York City Area in 1970; and worked as a Computer Operator for Banker's Trust Co. in 1971; and worked as a Veteran Affairs Coordinator for New York City in 1972. The appellant served in the U.S. Army as an Airborne Power Engineer and Artillery Surveyor from 1962-65 received an Honorable Discharge and

a Presidential Citation. The Appellant had also devoted considerable volunteer time to several groups, including inmates at Ossining Prison; Fort Six Rehabilitation Program; and the Quaker Friends Committee. Notwithstanding the appellant's educational background, military and community service, the trial Judge sentenced the appellant to a term of imprisonment of fifteen (15) years. (A.)

The Federal Courts have generally adhered to the view that a sentence imposed by a Federal District Judge, if within statutory limits, is not subject to review. United States v. Tucker, 404 U.S. 443, 447 (1972); Gore v. United States, 357 U.S. 386, 393 (1958); Blockburger v. United States, 284 U.S. 299, 305 (1932). This Court and an increasing number of appellate courts, however, are reviewing sentences in limited circumstances where the trial judge has abused his discretion;[8] or where the sentence is considered to be excessive cases have been remanded for the trial judge to reconsider the sentence.[9] The Seventh Circuit in United States v. Wiley, 278 F.2 500 (7th Cir. 1960) reversed a sentence that it felt was excessive although it did not exceed the statutory limit.[10] And in Woosley v. United States, 478 F.2 139 (8th Cir. 1973), the Court of Appeals for the Eighth Circuit on rehearing en banc held that the imposition of a five-year sentence or a 19-year member of the Jehovah's Witnesses was excessive and an abuse of the

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8/ See e.g. U.S. v. McCord, 466 F.2 17, 19 (2nd Cir. 1972). U.S. v. Holder, 412 F.2 212, 214, 215, (2nd Cir. 1969); U.S. v. Weiner, 418 F.2 849, 581 (5th Cir. 1969); U.S. v. Latimer, 415 F.2 1288, 1290 (6th Cir. 1969).

9/ U.S. v. Ginzburg, 398 F.2 52 (3rd Cir. 1968); Lee v. U.S., 344 F.2 566 (D.C. Cir. 1965); U.S. v. Wilson, 450 F.2 495 (4th Cir. (1971).

10/ See 278 F.2 at 503; 109 U. Pa. L. Rev. 422 (1960); 75 Harv. L.Rev. 416 (1961).

trial judge's discretion. The Court reviewed the current status of appellate review of sentences, [11] *and concluded that the Supreme Court support for the rule that federal appellate courts generally may not review a sentence is pure dicta, citing inter alia, 2 C. Wright, Federal Practice and Procedure Section 533 at 451-52 (1969). 478 F.$_2$ at 142*

In its opinion the Court stated in relevant part:

* * *

> *A mechanical approach to sentencing plainly conflicts with the sentencing guidelines announced by the Supreme Court in Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (I949), and Williams v. Oklahoma, supra, 358 U.S. 576, 79 S. Ct. 421, 3 L. Ed.$_2$ 516.*

In Williams v. New York, supra, the Court stated:

> *A sentencing judge...is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. ... Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.*
>
> *(478 F.$_2$ at 143)*

In holding that the imposition of the maximum sentence was an abuse of discretion the Court quoted from this Court's decision in United States v. Holder, 412 F.$_2$ 212. 214-215 (2nd Cir. 1969), stating:

> *"If the sentence could be characterized as so manifest an abuse of discretion as to violate traditional concepts, it is*

11/ See N. 3, 478 F.$_2$ at 141.

possible that we might, pursuant to our power to supervise the administration of justice in the circuit, overturn our long established precedents of non-intervention and intervene."
(478 F.$_2$ at 147)

The Court further stated in Woosley that "a mechanical approach to sentencing, such as that is used here, ignores the Supreme Court's decree that sentences be tailored to fit the offender." (478 F.$_2$ at 144)

The instant case although factually distinguishable from Woosley and Holder involves the mechanical application of fifteen (15) year sentences for bank robbery. Judge Pollack presided at the trial of the appellant's co-defendant WITHERS POON and upon his conviction WITHERS POON was sentenced to fifteen (15) years as was CHARLES JOHNSON whose sentence was subsequently reduced to twelve (12) years. Although time does not permit a comprehensive examination of all bank robbery trials that Judge Pollack has presided, a statistical compilation would probably reveal that for persons convicted for bank robbery Judge Pollack sentences them to fifteen (15) years.

This sentence of the appellant bears no logical relationship to his educational or family background; nor to his military and community service and should be reversed.[12/]

12/ *See also M. Frankel, Criminal Sentences: Law Without Order (1973)*

CONCLUSION

WHEREFORE, for the foregoing reasons, the defendant-appellant respectfully submits that his conviction should be reversed and his sentence set aside and a new trial ordered.

Defendant-appellant requests oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the Brief for the Defendant-Appellant by personally delivering same to the following address:

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